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Medically Assisted Reproduction in the United Kingdom

Definitions:

Female/Male- Refers to one's sex at birth, not gender.

Introduction

Medically assisted reproduction (MAR) is enacted when a couple, including same-sex couples, or single women requires assistance in having a child. This process aids, just to name a few, those who: are infertile, carry genetic diseases they don't wish to pass on or are couples with a child that requires a 'saviour sibling' to survive[1]. The 1978 birth of Louise Brown, the first 'test-tube' baby, was just the beginning of such innovation, but the moral debate that followed pushed the government to establish a 1984 committee to report and recommend on new legislation[2]. The resulting Warnock resort helped legislate the Human fertilisation and Embryology Act 1990 which entrusted regulation to the Human Fertilisation and Embryology Authority (HFEA) and was further updated in 2008 to remove explicit paternalism[3]. In this paper I will discuss the current assistance available, including artificial insemination and surrogacy, and the case law that surrounds it. I will focus on the most important aspects of the legislation in relation to the procedure and issues with medically assisted reproduction in the United Kingdom.

Artificial insemination and IVF

Artificial insemination is a procedure that requires semen to be secured, whether from a partner (homologous insemination) or a third party (heterologous insemination) and then injected into the

[1] Margaret Brazier and Emma Cave, *Medicine, Patients And The Law* (6th edn, Manchester University Press 2016).
[2] Margaret Brazier and Emma Cave, *Medicine, Patients And The Law* (6th edn, Manchester University Press 2016).
[3] Margaret Brazier and Emma Cave, *Medicine, Patients And The Law* (6th edn, Manchester University Press 2016).

womb as to induce pregnancy[4]. Upon failure to succeed one may undertake In vitro fertilisation (IVF) where an embryo is harvested, fertilised, and then returned to the womb for a greater chance of success[5].

The legal framework in the United Kingdom:

Human fertilisation and Embryology Act 1990

The HFEA 1990 set out the prohibitions in relation with embryos (section 3) and gametes (section 4). These bans are important as they set out the need for a license in relation to artificial insemination and IVF, as well as the prevention of the keeping/use of embryos after the primitive streak, the replacing of the nucleus and the placing of an embryo in an animal. Prohibitions in relation to gametes, in section 4, are similar to those of embryos[6].

Section 5 vested authority into the Human Fertilisation and Embryology Authority and gave it responsibility for regulation throughout the United Kingdom by operating as the statutory licencing authority[7]. This power means it is the sole licensor of clinics across the nation and section 3 and 4 follows this up by criminalising the creation or storing of an embryo outside a human body unless, through a HFEA facility[8]. This stems from the moral debate surrounding medically assisted reproduction that raises whether embryos have moral status, and although its widely concluded that as non-persons embryos have no independent status, they still deserve some form of protection through the HFEA[9].

[4] George P. Smith, 'Through A Test Tube Darkly: Artificial Insemination And The Law' (1968) 67 Michigan Law Review.
[5] Patricio Ventura-Juncá and others, 'In Vitro Fertilization (IVF) In Mammals: Epigenetic And Developmental Alterations. Scientific And Bioethical Implications For IVF In Humans' (2015) 48 Biological Research.
[6] Human Fertilisation and Embryology Act 1990
[7] Margaret Brazier and Emma Cave, *Medicine, Patients And The Law* (6th edn, Manchester University Press 2016).
[8] Margaret Brazier and Emma Cave, *Medicine, Patients And The Law* (6th edn, Manchester University Press 2016).
[9] Thomas A. Shannon and Allan B. Wolter, 'Reflections On The Moral Status Of The Pre-Embryo' (1990) 51 Theological Studies.

However, the 1990 legislation was widely criticised for its failure to regulate the potential genetic combination of animals and humans, as well as paternalism as it proposed "the need of a father" as a qualification[10].

Human fertilisation and Embryology Act 2008

The 2008 amendment revised the issues mentioned above through section 4 which prohibits medically assisted reproduction in connection with genetic material not of human origin and gender neutralising the "need for a father" into a "need for supportive parenting"[11]. It also introduced and structured the eligibility of female same-sex couples for treatment in sections 42-47 and 53[12].

But it did become more complex to understand with even the definitions of embryo and gamete being re-defined. The 2008 legislation took a more forward-thinking approach to medically assisted reproduction as it included anticipatory scientific potentials, not just those achievable in the present[13]. This is likely to be of benefit though, with global talks of chimera creation and testing currently underway the HFEA 2008 section 4A has already made it clear that it for now banned in the UK[14].

Eligibility

The maximum age eligibility of people for artificial insemination and IVF is largely left to the individual clinics, whether they're a part of the NHS or private, to decide. This can depend on the levels of success in certain areas, as well as the level of people applying for assistance[15]. However, the

[10] Jonathon LaTourelle, 'The Report Of The Committee Of Inquiry Into Human Fertilisation And Embryology (1984), By Mary Warnock And The Committee Of Inquiry Into Human Fertilisation And Embryology', *Embryo Project Encyclopedia* (2014).
[11] Jonathon LaTourelle, 'The Report Of The Committee Of Inquiry Into Human Fertilisation And Embryology (1984), By Mary Warnock And The Committee Of Inquiry Into Human Fertilisation And Embryology', *Embryo Project Encyclopedia* (2014).
[12] Human Fertilisation and Embryology Act 2008.
[13] Human Fertilisation and Embryology Act 2008.
[14] Human Fertilisation and Embryology Act 2008.
[15] Margaret Brazier and Emma Cave, *Medicine, Patients And The Law* (6th edn, Manchester University Press 2016).

act provides that couples (including same-sex women), those in a marriage/civil partnership and single women can apply and receive the procedure[16].

Post-Mortem insemination

Post-mortem insemination typically occurs when a posthumous child is conceived using the sperm of a deceased man[17]. However, one's eligibility for legal 'father' or 'mother' can be changed by the death of any party involved[18]. After the death of the man that provided the sperm section 39 of the HFEA states that only through their prior consent to the use of an embryo after death, and the women's election in writing of them as father 42 days after the birth of the child (28 in Scotland), can they be considered the father[19].

In light of the death of man who didn't provide sperm they are to be considered the father according to section 40 of the HFEA if they, as the other party to the marriage or civil partnership, consented in writing to the embryo being placed in the women after his death and to being treated as the father to any resulting child, fulfilled the agreed fatherhood condition from section 37 HREA were met before death, and if women has elected in writing within 42 days (21 for Scotland) of childbirth[20]. If this man was not in a marriage/civil partnership with the women when the embryo was created, they can still be considered the legal father if the same conditions are met as if married or in a civil partnership according to section 40(2) HFEA[21].

After the death of the female spouse, civil partner or intended partner they can still be considered the parent, for the purposes of being entered as the child's other parent when registering the birth[22]. This

[16] Human Fertilisation and Embryology Act 2008.
[17] John Gibbons, 'Who's Your Daddy?: A Constitutional Analysis Of P Our Daddy?: A Constitutional Analysis Of Post-Mortem Insemination' (1997) 14 Journal of Contemporary Health Law & Policy (1985-2015).
[18] Human Fertilisation and Embryology Act 2008.
[19] Human Fertilisation and Embryology Act 2008.
[20] Human Fertilisation and Embryology Act 2008.
[21] Human Fertilisation and Embryology Act 2008.
[22] Human Fertilisation and Embryology Act 2008.

occurs, according to section 46 HFEA, when the women consented in writing to the placing of the embryo after the death of the other party and to be treated as the parent of the resulting child, and if the women elected in writing 42 days after childbirth (21 for Scotland) that they are to be treated as such[23]. If the women were not a spouse/civil partner they also have to have agreed, immediately before death, to the female parenthood conditions set out in section 44 HFEA[24].

However, all these considerations can be discarded if another person is considered as parent to the child by virtue of adoption or if somebody else was in a civil partnership/marriage with the women at the time of treatment according to section 42 HFEA[25].

Genetic preimplantation

Preimplantation genetic diagnosis (PGD)

PGD is undertaken to determine whether an embryo has a condition that would increase the risk of genetic disease[26]. This is important as PGD indications include severe diseases and so the procedure aims to help safeguard reproduction[27]. Section 3zA(3) of the HFEA does state that a permitted egg or sperm must not have an altered nucleus or mitochondrial DNA[28]. But the HFEA 2008 regulations provided that an egg or embryo can be permitted if the mitochondrial DNA was altered to prevent the transmission of serious mitochondrial diseases[29]. It also allows for the sex of the embryo to be established before implantation as to prevent any possible gender-related hereditary disease[30].

[23] Human Fertilisation and Embryology Act 2008.
[24] Human Fertilisation and Embryology Act 2008.
[25] Human Fertilisation and Embryology Act 2008.
[26] E. Dahl, 'Ethical Issues In New Uses Of Preimplantation Genetic Diagnosis: Should Parents Be Allowed To Use Preimplantation Genetic Diagnosis To Choose The Sexual Orientation Of Their Children?' (2003) 18 Human Reproduction.
[27] NHS England, 'Clinical Commissioning Policy: Pre-Implantation Genetic Diagnosis (PGD)' (2013).
[28] Human Fertilisation and Embryology Act 2008.
[29] Human Fertilisation and Embryology Act 2008.
[30] Human Fertilisation and Embryology Act 2008.

Problems

Guidelines

The HFEA legislation is somewhat lacking in that it doesn't provide a comprehensive guideline on who, in age, specifically is eligible for IVF and artificial insemination. Instead it is left to individual clinics, managed by a clinical commissioning group, to determine. Regarding NHS clinics, even though they all have to follow the same NHS constitution, there are still differing age cut-offs across the nation. This does attribute to an unequal access to such treatments across the UK. This leaves citizens feeling like there is a 'postcode lottery' with their chances at having a successful medically assisted pregnancy[31]. More recently the National Institute for Health and Care Excellence 2013 set a national guideline, with section 1.11 providing clinics with access criteria for all clinics, not just those affiliated with the NHS[32]. This amended some previous issues, however there has been a continual failure to uphold a similar level of treatment funding, of which correlates with the levels of treatment undertaken overall, between heterosexual and same-sex female couples[33]. This was demonstrated by the findings of the 'Family formations in fertility treatment 2018' and the "UK IVF and DI statistics for heterosexual, female same-sex and single patients" which showed heterosexual couples are more likely to receive NHS-funded cycles, at 16% for DI cycles and 39% of IVF cycles in 2020[34]. This is in contrast to same-sex female couples that achieved 13% of DI cycles and 14% of IVF cycles[35]. The difference in funding statistics shows a level of heteronormativity within the medical profession, especially since the approval statistics should've increased more significantly since the 2013 ratification of the gay marriage legislation. This is especially pertinent as the HFEA 2008 blatantly

[31] 'Fertility Network | NHS Funding FAQ | Fertility Network' (*Fertilitynetworkuk.org*, 2020) <https://fertilitynetworkuk.org/trying-to-conceive/nhs-funding/funding-faqs/?gclid=CjwKCAjw_Y_8BRBiEiwA5MCBJk2q-48VWj7W6d8Y9dBDb00gCOHuoBpG10snp6a18cZVcJwaEKnkFhoC1sgQAvD_BwE> accessed 12 October 2020.

[32] 'Overview | Fertility Problems: Assessment And Treatment | Guidance | NICE' (*Nice.org.uk*, 2020) <https://www.nice.org.uk/guidance/cg156> accessed 12 October 2020.

[33] 'Family Formations In Fertility Treatment 2018 | Human Fertilisation And Embryology Authority' (*Hfea.gov.uk*, 2020) <https://www.hfea.gov.uk/about-us/publications/research-and-data/family-formations-in-fertility-treatment-2018/> accessed 12 October 2020.

[34] 'Family Formations In Fertility Treatment 2018 | Human Fertilisation And Embryology Authority' (*Hfea.gov.uk*, 2020) <https://www.hfea.gov.uk/about-us/publications/research-and-data/family-formations-in-fertility-treatment-2018/> accessed 12 October 2020.

[35] 'Family Formations In Fertility Treatment 2018 | Human Fertilisation And Embryology Authority' (*Hfea.gov.uk*, 2020) <https://www.hfea.gov.uk/about-us/publications/research-and-data/family-formations-in-fertility-treatment-2018/> accessed 12 October 2020.

includes same sex couples as eligible for medically assisted reproduction. It also demonstrates that even though the paternalism from the HFEA 1990 was removed, it can still reside in practice when looking at female couples as well as single women.

Tourism

A distinct issue of having different accessibility of IVF and DI across the UK is that some couples may resort to cheaper options abroad if the NHS denies them treatment funding. This is as even one cycle of treatment can cost up to £5000 [36]. Even though the wait list for medically assisted reproduction in the UK is relatively short, with the average wait time being roughly 4 months, there is a limited access to multiple cycle funding which lowers success rates[37]. Treatment abroad may provide more cycles for less money, but it can be dangerous for a woman's health as the don't receive the continual check-ups needed for optimum health.

Donor anonymity

Donor anonymity is no longer kept in the UK as an egg or sperm donor can now only stay anonymous till the child they helped produce turns 18[38]. The child can then submit a request for the identity of the donor to be released to them. This could result in less people willing to donate as the outcome could see several offspring seeking them out. However, the donor under the HFEA has no responsibilities over them unless they are elected to, which helps provide donor reassurance. The limited donor anonymity also provides the child some comfort as if they wish they can seek out their biological parent.

Case Law

British case law

[36] Carl Heneghan and others, 'Lack Of Evidence For Interventions Offered In UK Fertility Centres' (2016) 355 BMJ <https://www.bmj.com/content/355/bmj.i6295> accessed 4 October 2020.
[37] Carl Heneghan and others, 'Lack Of Evidence For Interventions Offered In UK Fertility Centres' (2016) 355 BMJ <https://www.bmj.com/content/355/bmj.i6295> accessed 4 October 2020
[38] The Human Fertilisation and Embryology Act 2008

Medically assisted reproduction litigation in the United Kingdom largely surrounds parental responsibility or status. This focus on the importance of parental status was seen in *M V F [2013] EWHC 1901 [fam], [9]*. This case highlighted the importance of regulation as an unpaid sperm donor, who was used by a couple as to conceive, tried to claim that the sperm was artificially inseminated as to avoid responsibility as the legal parent[39]. However, the mother claimed that conception was achieved through sexual intercourse instead[40]. The court upheld this which resulted in the 'donor' being considered as father to the child[41].

Leeds teaching hospital NHS trust V A [2003] 1 FLR 1091 confirmed that a mere genetic relationship didn't implement a parental relationship where it was not intended. In this case a third party's sperm was mistakenly used in an intracytoplasmic sperm injection instead of sperm from the husband[42]. The Queen's bench division affirmed that as the third party did not consent to being the legal father, that they had no parental relationship[43]. But it also held that, under the HFEA, because the husband had not consented to the third party's sperm to be used with his wife's egg that he also couldn't be considered the father[44].

European case law

Evans V the United Kingdom (2007) ECHR 264 saw the applicant (Evans) appeal to the ECHR to gain consent to use the embryos she and her ex-partner (J) had frozen before their relationship had broken down. J applied to the clinic to have the embryos destroyed and to remove his consent to their use, but Evans wished to still use them as her ovaries were removed due to Cancerous tumours[45]. J had previously told her she wouldn't need any more eggs frozen, before the removal of her ovary, as they already had embryos stored and so these embryos are Evans' only chance at having a child[46]. The case

[39] *M V F [2013] EWHC 1901 [fam], [9].*
[40] *M V F [2013] EWHC 1901 [fam], [9].*
[41] *M V F [2013] EWHC 1901 [fam], [9].*
[42] *Leeds teaching hospital NHS trust V A [2003] 1 FLR 1091.*
[43] *Leeds teaching hospital NHS trust V A [2003] 1 FLR 1091.*
[44] *Leeds teaching hospital NHS trust V A [2003] 1 FLR 1091.*
[45] *Evans V the United Kingdom (2007) ECHR 264.*
[46] *Evans V the United Kingdom (2007) ECHR 264.*

failed initially in the High court as J had only consented to treatment together, not for Evans on her own and so violated section 3 of the HFEA[47]. The Court of Appeal also dismissed her appeal on the grounds that this interference with Evans' right to a private and family life through Article 8 of the European Convention of Human Rights was justifiable as it subsequently would interfere with J's rights in Article 8[48]. In the ECtHR Evans lost again and the court established that the embryos did not have a right to life under Article 2 and that there was no breach of Article 14 as there was no discrimination[49]. The court spent most time debating over whether there was a breach of Article 8 but the Grand Chamber agreed that there was no breach and so her appeal failed[50]. Even though Evans' case failed, it was one reason that the new HFEA 2008 introduced a cooling time of 1 year when destroying embryos.

Surrogacy

Surrogacy is an arrangement that involves a woman to carrying a child for another person. Traditional surrogacy occurs when a woman is artificially inseminated with sperm and the woman's own egg is

[47] *Evans V the United Kingdom (2007) ECHR 264.*
[48] *Evans V the United Kingdom (2007) ECHR 264.*
[49] *Evans V the United Kingdom (2007) ECHR 264.*
[50] *Evans V the United Kingdom (2007) ECHR 264.*

used. Therefore, the surrogate is the child's biological mother. However, Gestational surrogacy uses in vitro fertilisation to join the mother's egg and father's sperm together[51]. This embryo is then placed in the surrogate and is less complex legally as the surrogate is not the child's biological mother. Surrogacy traditionally involves a contract that agrees to give the resulting child to the couple, whether verbal or in writing, with the surrogate but these are viewed as unenforceable[52].

The legal framework

The Surrogacy Arrangements Act 1985

The current legislation on surrogacy was originally set out in the Surrogacy Arrangements Act 1985. This act was important as it viewed surrogacy contracts as unenforceable, banned the commercial advertisement of such services and prohibited commercial brokering of surrogacy.

Section 1 defined the meaning of surrogate mother as someone who has agreed to carry a child in pursuance with an agreement made before she became pregnant and for the purposes of the child being handed over to another.

Section 2 most importantly banned the negotiation of surrogacy on a commercial basis and section 3 aided this in banning advertisements of surrogacy. These two sections are important as they outwardly ban the ability to financially gain from a surrogacy agreement and aim to insure an altruistic surrogate. However, they do make it difficult for people to find a surrogate at the initial start of the process.

Human fertilisation and Embryology Act 1990

The ratification of the Human Fertilisation and Embryology Act 1990 did not overturn the entire Surrogacy Arrangements Act 1985, but it did amend several parts of it. The alterations made by the

[51] Margaret Brazier and Emma Cave, *Medicine, Patients And The Law* (6th edn, Manchester University Press 2016).
[52] Margaret Brazier and Emma Cave, *Medicine, Patients And The Law* (6th edn, Manchester University Press 2016).

Human Fertilisation and Embryology Act 1990 included additions into section 1A by section 36(1) that "no surrogacy arrangement is enforceable by or against any of the persons making it"[53].

Section 54 introduced the option of parental orders to couples using surrogate arrangements[54]. This was a positive step as prior to the HFEA 1990 couples were unable to directly attain, at the birth of the child, parenthood responsibilities through a parental order, they instead had to go through the process of adoption[55]. The process of adoption is not made for surrogate cases which often creates a more complicated procedure.

Human fertilisation and Embryology Act 2008

The update of the Human Fertilisation and Embryology Act 1990 was long overdue, but it didn't provide much more to the legislation surrounding surrogacy. But what it did provide was a clearer definition of a non-profit making body into the Surrogacy Act 1985. The idea of a non-profit body refers to how a surrogate cannot make any money for personal gain through the act of Surrogacy[56]. This is aiming to prevent people from becoming surrogates for financial gain and instead ensure an altruistic reasoning.

It also inserted into section 2 and 3 of the Surrogacy Arrangements Act 1985 times at which surrogacy could be advertised and negotiated for a commercial basis, of which included advertisement by or on behalf of a non-profit body. This was important as it made surrogacy agreements easier to find and safer to undertake.

Eligibility

[53] Human Fertilisation and Embryology Act 1990.
[54] Human Fertilisation and Embryology Act 1990.
[55] Human Fertilisation and Embryology Act 1990.
[56] Human fertilisation and Embryology Act 2008.

Surrogacy is a largely unregulated area in regards for who is eligible for such services. This is due to section 59(2) of the HFEA that states that surrogacy should not, in general, be negotiated on a commercial basis[57]. This is likely just one reason that the NHS does not offer surrogacy services, as well as the ethical concerns surrounding such a situation.

The HFEA 2008 doesn't provide a maximum or minimum age for someone to be a surrogate and fails to enforce any extra guidelines to protect the rights of LGBTQ couples to surrogacy[58]. This is because surrogacy is seen as a choice not a human right.

Eligibility towards seeking a surrogate more so lies in whether, through section 54 and 54A of the HFEA, a parental order application can be made[59]. To apply for a parental order in England and Wales you must submit a C51 court form to the family court where, with consent from all parties, the court will issue the application and send a C52 form to the intended parent(s)[60]. This should be signed by them and the surrogate, returned to court and then a parental order reporter from CAFCASS will interview and decide whether to recommend them for a parental order. The surrogate and any parent of the child must fill out the A101A form to confirm agreement to the parental order. In Scotland couples must contact the Court of Session or Sheriff Court instead and in Northern Ireland the Courts and Tribunals Service must be contacted[61]. This process must be completed within 6 months of the child's birth or the route of adoption must be taken instead[62]. These orders can be granted to married

[57] Human Fertilisation and Embryology Act 2008.
[58] Human Fertilisation and Embryology Act 2008.
[59] Human Fertilisation and Embryology Act 2008.
[60] HM Courts & Tribunals Service, 'Application For A Parental Order (Section 54 Human Fertilisation And Embryology Act 2008)' (2016).
[61] HM Courts & Tribunals Service, 'Application For A Parental Order (Section 54 Human Fertilisation And Embryology Act 2008)' (2016).
[62] *Human fertilisation and Embryology Act 2008*

couples and civil partners[63]. As well as people living in an enduring family relationship, disregarding illegal relationships such as those between siblings, as a couple[64].

However, section 54 of the HFEA 2008 required a couple to apply for a parental order, effectively disregarding the eligibility of single individuals[65]. This was contested in In the matter of *Z (A Child) (No 2), [2016] EWHC 1191 (Fam), 20 May 2016*, para 2 where a single man (z) aimed to get the court to agree with the idea that, in accordance with section 3(1) of the Human Rights Act 1998, section 54 could be "read down" to include single individuals[66]. This was denied by Sir James and so z contested that it was instead incompatible, using section 4 if the Human Rights Act 1998, with article 14 (prohibition of discrimination) and 8 (right to respect for private and family life) of the European Convention of Human Right[67]. The Secretary of State agreed it was discrimination and declared section 54(1)/(2) of the HFEA 2008 incompatible with the ECHR[68]. To amend this issue a remedial order was drafted, using the findings of the JCHR report, and finally came into force at the beginning of 2019. Section 54A(1) of the HFEA 2008 (Remedial) Order 2018 (SI 2018/1413)) subsequently introduced the eligibility of single people for a parental order into formal legislation[69].

Problems

Removed consent for a parental order

The most prominent issue couples may have with the option of surrogacy is that the surrogate can, upon birth of the child, choose to take on the legal parental role as 'mother'. This is because section 1A of the Surrogacy Act 1985 makes surrogacy contracts unenforceable[70]. This is to protect the concept of bodily autonomy and to prevent contracts being made around the 'right' to a child.

[63] HM Courts & Tribunals Service, 'Application For A Parental Order (Section 54 Human Fertilisation And Embryology Act 2008)' (2016).
[64]HM Courts & Tribunals Service, 'Application For A Parental Order (Section 54 Human Fertilisation And Embryology Act 2008)' (2016).
[65] Human Fertilisation and Embryology Act 2008.
[66] *Z (A Child) (No 2), [2016] EWHC 1191 (Fam), 20 May 2016.*
[67] *Z (A Child) (No 2), [2016] EWHC 1191 (Fam), 20 May 2016.*
[68] *Z (A Child) (No 2), [2016] EWHC 1191 (Fam), 20 May 2016.*
[69] Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018 (SI 2018/1413))
[70] Surrogacy Arrangements Act 1985.

However, this does not allow the surrogate to completely avoid any predetermined agreements as the commissioning couple can seek a court order for the child to live with them. This is because the welfare of the child is paramount in deciding whether to provide a court order.

Withdrawn consent of commissioners

The commissioners, like the surrogate, can change their mind regarding the parenthood of the child due to section 36(1) of the HFEA 2008 making the agreement unenforceable[71]. This is an issue as the surrogate may not wish to keep the child, especially as they did not consent to the agreement to keep the resulting child. If the surrogate does not wish to keep the child, then they become a ward of the state and put up for adoption[72].

Surrogacy tourism

Tourism regarding surrogacy is a problem ethically as, when a person from a high-income country travels to one of middle/ low income there is a elevated risk of exploitation. Surrogacy tourism to India was estimated to be a $2.3 billion dollar industry in 2011 and was widely regarded as the global capital of surrogacy[73]. However, this industry was reportedly put to an end through the 2015 banning as a result of the blatant abuse of reproductive rights and female autonomy. A surrogate abroad may also be unable to give informed consent to the procedure[74]. This could especially be the case in places with lower literacy rates, where surrogates are agreeing to the arrangement for financial benefit[75]. The lack of standardisation in commercial payments to surrogates also leaves more room for exploitation. Humbyrd has suggested that this could be combated by a 'fair trade surrogacy' model in which payments are standardised[76].

[71] Human Fertilisation and Embryology Act 2008.
[72] Margaret Brazier and Emma Cave, *Medicine, Patients And The Law* (6th edn, Manchester University Press 2016).
[73] H Brenhouse, 'India's Rent-A-Womb U=Industry Faces New Restrictions' [2011] *Time Magazine*.
[74] Deonandan R, Green S, van Beinum AEthical concerns for maternal surrogacy and reproductive tourismJournal of Medical Ethics 2012;38:742-745.
[75] Deonandan R, Green S, van Beinum AEthical concerns for maternal surrogacy and reproductive tourismJournal of Medical Ethics 2012;38:742-745.
[76] CASEY HUMBYRD, 'FAIR TRADE INTERNATIONAL SURROGACY' (2009) 9 Developing World Bioethics.

However, this model wouldn't prevent the conflict of interest of medical facilities profiting from commercial surrogacy as they will still have to choose between the health of a surrogate versus monetary gain[77]. The ethics in play are essentially of a business instead of medical which leads us to the possibility that clinics, like most businesses, are focused on profit[78]. This is especially problematic when we look at how difficult medical advocacy would be when there are so many parties involved as well as the differing custody rights available abroad.

Case law

H & S (Surrogacy Arrangement) [2015] EWFC 36 demonstrated that the welfare of the child is paramount to the court's decision to give a Parental Order. This case occurred as the surrogate decided to keep the baby, but the High Court ruled in favour of the commissioning gay couple[79]. The issue in question with the surrogate was widely displayed in court as she repeatedly made up different allegations about the gay couple's lifestyle in an attempt to sway the court[80]. The surrogate had also failed to adhere to court orders regarding the child previously and so it was concluded that she had been purely driven in acquiring herself another child, only 'agreeing' to the arrangement to obtain insemination[81]. So the court ruled that they believed the child's welfare would be better maintained with the gay couple, as the surrogate was "more likely than not" to present the gay couples in a negative way the child causing her psychological damage[82].

JP v LP and others (surrogacy arrangements: wardship) [2014] EWHC 595 (fam) involved a child created through a partial surrogacy arrangement and considered whether JP could gain the legal title of mother. At birth, a contract was made by solicitors regarding the surrogacy agreement[83]. Justice King observed that this contract was unenforceable in law due to section 2 of the Surrogacy

[77] CASEY HUMBYRD, 'FAIR TRADE INTERNATIONAL SURROGACY' (2009) 9 Developing World Bioethics.
[78] CASEY HUMBYRD, 'FAIR TRADE INTERNATIONAL SURROGACY' (2009) 9 Developing World Bioethics.
[79] *H & S (Surrogacy Arrangement) [2015] EWFC 36.*
[80] *H & S (Surrogacy Arrangement) [2015] EWFC 36.*
[81] *H & S (Surrogacy Arrangement) [2015] EWFC 36.*
[82] *H & S (Surrogacy Arrangement) [2015] EWFC 36.*
[83] *JP v LP and others (surrogacy arrangements: wardship) [2014] EWHC 595 (fam).*

Arrangements Act 1985 which prohibits commercial negotiation of surrogacy[84]. The relationship between the biological father and his wife (JP) ended and so she applied for a parental order[85]. As it was past 6 months of birth this application was unable to continue and, as she wasn't in an enduring relationship, she couldn't take the course of adoption[86]. Justice King noted that the legal positions of each party therefore still saw the surrogate as the legal mother, husband as the legal father and JP as 'psychological mother'[87]. This case therefore displayed the importance of applying for a parental order.

Whittington Hospital NHS Trust V XX [2018] EWCA Civ 2832 regarded an appeal by Ms X in which she was argued that she should be awarded damages for the cost of her commercial surrogacy in the USA. This is as Ms X was left infertile by the Hospital Trust's negligence and failure to correctly report the results of smear tests that showed she had the cervical cancer that caused her infertility[88]. In High Court the claim for damages failed as Sir Robert Nelson stated they were bound by *Briody v St Helens and Knowsley Area Health Authority [2001] EWCA Civ 1010, [2002] QB 856*[89]. He limited the claim to the cost of 2 surrogacies in the UK in which the claimant would've used her own egg. Ms X appealed and Lady Hale in the supreme court concluded that awards for damages for foreign commercial surrogacy are no longer contrary to public policy[90]. She did include that costs must be reasonable, and it must be reasonable that the claimant sought commercial surrogacy abroad instead of another arrangement in the UK[91].

The future of surrogacy?

Automatic legal parenthood

[84] *JP v LP and others (surrogacy arrangements: wardship) [2014] EWHC 595 (fam).*
[85] *JP v LP and others (surrogacy arrangements: wardship) [2014] EWHC 595 (fam).*
[86] *JP v LP and others (surrogacy arrangements: wardship) [2014] EWHC 595 (fam).*
[87] *JP v LP and others (surrogacy arrangements: wardship) [2014] EWHC 595 (fam*.
[88] *Whittington Hospital NHS Trust V XX [2018] EWCA Civ 2832.*
[89] *Whittington Hospital NHS Trust V XX [2018] EWCA Civ 2832.*
[90] *Whittington Hospital NHS Trust V XX [2018] EWCA Civ 2832.*
[91] *Whittington Hospital NHS Trust V XX [2018] EWCA Civ 2832.*

The argument for automatic legal parenthood is being adopted by more and more people as a way of preventing the several month wait for a parenthood order. This was demonstrated by a Surrogacy UK survey in which 84% of respondents believed that automatic legal parenthood at the point of birth should be introduced into legislation[92]. However, this is unlikely as it would breach section 36(1) of the HFEA as it would make surrogacy agreements somewhat enforceable[93].

Commercial surrogacy in the UK

Profiting of surrogacy is widely seen abroad with one of the biggest examples being seen currently in the USA where first time surrogates can achieve an average base of $25,000 (Surrogate.com). However, I find it unlikely that the UK will allow such a profit as it will overturn the altruistic nature of the agreement and instead encourage a financial aim. Even, when surveyed in 2018 by Surrogacy UK, over 70% of surrogates agreed or strongly agreed to the idea that surrogates should only be able to claim viable expenses[94]. This is because changes would ultimately make the route of surrogacy much less accessible to the average person and encourage what could be considered the selling of children.

Potential changes in medically assisted reproduction legislation?

Cloning

Cloning was initially banned in the UK by the Human Reproductive Cloning Act 2001. This act forbade the placing of an embryo in a woman unless it was created through fertilisation and made it a

[92] Surrogacy Law Reform, 'Surrogacy In The UK: Further Evidence For Reform' (Surrogacy UK 2018).
[93] Human Fertilisation and Embryology Act 2008.
[94] Surrogacy Law Reform, 'Surrogacy In The UK: Further Evidence For Reform' (Surrogacy UK 2018).

convictable offense[95]. But the Human Reproductive Cloning Act 2001 was repealed in 2008, not due to a change in views on cloning but because the HFEA 2008 replaced it.

Cloning as an option to combat fertility problems seems like a potential fix for issues such as infertility, as well as a way to create organs. But this disregards the moral and biological issues of such a procedure, especially since biological reproduction is not a human right. The risk with cloned groups of individuals is that they won't possess a diversity in the gene pool, leading to a weakening of the natural protections from diseases. Their protection from infectious diseases would be severely diminished as they constantly mutate to find a host and cloned groups have no genetic diversity. Cloned beings also have a higher risk of being born with birth defects that could lead to a low quality of life[96]. This was demonstrated in the first documentation of mammal cloning in 1996 with Dolly the sheep who developed arthritis early on and after dying prematurely her scans showed lung cancer.

It also has significant socio-political risks as it could also be used for the mass cloning of individuals that have what are considered the 'ideal' genetics[97]. This is likely to create some form of invidious discrimination and would put a value on certain genetic features, as well as enact a form of reproductive oppression[98].

The outcome of legalising cloning may possibly provoke a commercialisation of human life for economic gain. Currently the commercial ownership of human cells is legal, and individuals have economic rights to these genetic patterns[99]. How this could translate over to cloned individuals is alarming as the creation and trafficking of human life could lead to slavery and would put a price on human life.

[95] Human Reproductive Cloning Act 2001.
[96] Carson Strong, 'Cloning And Infertility' (1998) 7 Cambridge Quarterly of Healthcare Ethics.
[97] Daniel Heimbach, 'Cloning Humans: Dangerous, Unjustifiable, And Genuinely Immoral' (1998) 32 Valparaiso University Law Review.
[98] Daniel Heimbach, 'Cloning Humans: Dangerous, Unjustifiable, And Genuinely Immoral' (1998) 32 Valparaiso University Law Review.
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Human-animal hybrids

The creation of an animal-human hybrid, often referred to as a chimera, is expressly banned in the UK through section 4(A) of the HFEA 2008. It specifically prohibits keeping a human-admixed embryo (a human embryo altered by the intro of animal cells or vice versa where the animal DNA is not prominent) beyond the primitive streak or for longer than 14 days, as well as implanting such an embryo in an animal for development purposes[100].

But there are a number of benefits to the lifting of this ban, including the generation of organs for transplants through the process of interspecies blastocyst complementation[101]. This was demonstrated in the 2010 landmark Kobayashi et al study in which they created a rat-mouse chimera by injecting a mouse with rat stem cells as to help it generate a working pancreas for itself. Research like this proved chimeras could be successfully created and in 2017 the Salk Institute for Biological Studies researchers, through the injection of human stem cells into pig embryos, affirmed the idea that human organs could be generated through such an act. But the conditions of chimeras used for organ transplants are likely to be raised in ways that would be of an animal welfare concern as they would be kept isolated from other animals[102]. However, these kinds of concerns already apply to current animal testing, as well as breeding for human consumption, and yet they are still being undertaken.

Nonetheless there are serious ethical implications of creating chimeras that could be seen to predominantly override many of the benefits. The main issue revolves around the distribution, or not, of the rights of chimeras that have a human brain or are predominantly biologically human. This uncertain moral status would be difficult to amend as determining at what point a chimera becomes

[100] Toshihiro Kobayashi and others, 'Generation Of Rat Pancreas In Mouse By Interspecific Blastocyst Injection Of Pluripotent Stem Cells' (2010) 142 Cell <https://www.cell.com/fulltext/S0092-8674(10)00843-3> accessed 10 October 2020.

[102] Jun Wu and others, 'Interspecies Chimerism With Mammalian Pluripotent Stem Cells' (2017) 168 Cell.

human ‘enough’ to gain rights will be highly polarising[103]. Especially as it would require legislators to consider the degrees of moral status chimeras could have, which could intervene on views surrounding current animal rights[104]. This is as animals already have different degrees of moral status, but it doesn't afford them more rights than those on the lower end of the spectrum[105].

The concept of scientists as ‘playing god’ in regards to the creation of scientists is another concern. Even though the creation of antibiotics and medical interventions in general could be considered as such, they fail to create a moral ethical boundary like chimeras do[106]. Especially since chimeras are also more likely to suffer seriously from drastic biological dysfunctions which is just another reason that section 4 of the HFEA should not be reformed.

Summary

The legislation surrounding medically assisted reproduction in the UK is extensive and covers a large number of reproductive areas from IVF to surrogacy. Its importance has been demonstrated in numerous case law, but it does have some ongoing issues. These largely originated due to the complex and sometimes confusing nature of the legislations in place, but through case law there is becoming a wider understanding of medically assisted reproduction law.

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